



Collaboration and FACA at EPA

EPA has been a leader among Federal agencies and departments in using collaborative approaches to environmental problem-solving. This guide will help EPA managers and staff to understand whether and how the Federal Advisory Committee Act impacts collaborative processes.

What is collaboration?

Collaboration can be thought of in two ways. First, it is an attitude that prompts people to approach their work in the spirit of cooperation and shared effort that leads to better, more creative results. Second, it is a specific approach to working with stakeholders, in which participants develop a mutually agreeable process for joint learning and problem solving.

As our environmental challenges become more complex, we are searching, jointly and cooperatively for better ways to carry out the Agency's mission. Collaboration will not replace regulation or substitute for making tough decisions, nor is it appropriate for all situations. Still, EPA has found collaboration to be effective for arriving at mutually acceptable solutions to environmental problems.

Collaborative processes can take many forms and can be either formal or informal. The degree of formality will depend upon the purpose of a collaboration process; desired end product; the number and diversity of stakeholders; the scale, scope, and complexity of the issues at hand; the duration of the process; and other factors.

EPA's role in collaborative environmental problem-solving also can take many forms. Depending on the situation, EPA may: serve in a leadership role; act as one of many interested parties in a collaborative effort established by another public or private sector entity; or simply be the beneficiary of a collaborative effort by outside parties that did not involve EPA participation.

What is the Federal Advisory Committee Act?

The Federal Advisory Committee Act (FACA or Act), 5 U.S.C. App. 2, governs the establishment, management, and termination of advisory committees within the executive branch of the Federal government. FACA ensures that federal advisory committees are accountable to the public by maximizing public access to advisory committee deliberations and minimizing the influence of special interests through balanced committee membership. In addition, the Act seeks to reduce wasteful expenditures and improve the overall administration of advisory committees.

Federal advisory committees can significantly strengthen the Agency's collaboration processes. Moreover, establishing a Federal advisory committee can be the best approach for achieving EPA's management objectives and ensuring that advice provided to EPA is developed through a structured, transparent, and inclusive public process. EPA has a central role in the formation of a Federal advisory committee and is able to work with the committee and provide input on the substantive issues the committee addresses. Subcommittees and work groups that report back to the chartered advisory committee can further the work of the committee through collaborative processes. Agency managers and outside stakeholders generally view the advice provided by Federal advisory committees as highly credible due to the: balanced membership of the committees; thorough vetting and selection process for members; formal opportunities for members of the public to provide written and oral public comment; and transparency of the meeting process. While FACA sets up requirements that Federal advisory committees must follow, those requirements generally mirror the best practices normally used in collaborative processes.

How does FACA affect collaborative approaches at EPA?

In general, FACA applies to collaborative efforts when all of the following criteria are met:

- 1) EPA establishes the group (that is, organizes or forms) or utilizes the group by exerting "actual management or control";
- 2) the group includes one or more individuals who are not Federal employees or elected officials of State, Tribal, or local government or employees with authority to speak on their behalf; and
- 3) the product of collaboration is group advice for EPA.

What does FACA require EPA to do?

To help EPA management meet all of the FACA requirements, the Office of Cooperative Environmental Management has developed a handbook that explains how to set up, manage and terminate a federal advisory committee. The handbook is available at <http://intranet.epa.gov/ocem/faca>. The FACA requirements include the following:

- 1) Develop a charter and publish notice of the establishment of the committee. A charter is a two to three page document that specifies the mission and general operational characteristics of the committee.
- 2) Balance the points of view represented by the membership of the committee in relation to the function the committee is to perform.
- 3) Announce meetings in the Federal Register in advance of the meeting.
- 4) Open the meetings to the public and allow the public to send in or present comments.
- 5) Keep minutes of each meeting, make committee documents available to the public, and maintain the committee's records.
- 6) Appoint a Designated Federal Officer (DFO) to manage the committee.

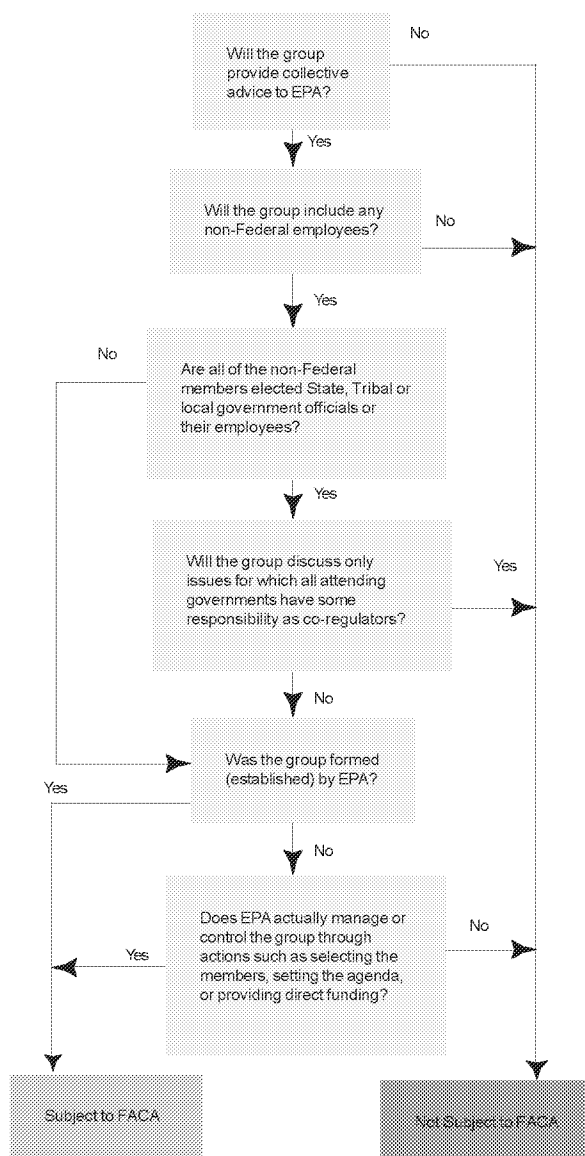
Are there collaborative problem-solving activities that are not subject to FACA?

Collaborative processes with EPA involvement may not be subject to FACA if any of the following apply:

- 1) EPA seeks advice and recommendations from the participants on an individual basis and not from the group as a whole;
- 2) The group is composed exclusively of elected officials from Federal, State, Tribal and local governments (or their designated employees with authority to speak on their behalf) and the purpose of the group is to exchange views, information, or advice relating to issue(s) of intergovernmental responsibility and administration (in short, responsibility as co-regulators);
- 3) The group is formed or assembled by a non-Federal entity (such as a non-Federal government, a contractor or a private organization) provided that the group is not actually managed or controlled by the federal government; or
- 4) The purpose of the group is to develop advice for non-Federal entities (such as States or industry sectors).

Pre-collaboration *situation assessments* can assist EPA managers and staff by providing information about whether a collaborative approach may be appropriate in a given situation and, if so, whether FACA may apply. If the program office determines that a given collaboration effort would invoke FACA, Agency managers and staff should consult with the Office of Cooperative Environmental Management (OCEM) for guidance on setting-up and operating a Federal advisory committee. If there are any questions as to whether FACA might apply, managers and staff should consult with the FACA attorney in the Office of General Counsel, Cross-Cutting Issues Law Office.

FACA APPLICABILITY DECISION TREE



This decision tree is intended as general guidance only. If you have questions regarding the applicability of FACA to a specific group, you should contact the Office of General Counsel.

Examples of Collaborations at EPA

Collaborative processes may or may not be subject to FACA. Following are examples of Agency collaborative processes that are subject to FACA as well as collaborative processes that are not. The description of each example provides an explanation about why it was or was not subject to FACA.

Collaborations subject to FACA

1) Negotiated Rulemaking Committee on All Appropriate Inquiry

In 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act ("the Brownfields Law"). The law established some protections from Superfund liability. One criteria specified in the statute for obtaining the protection from liability is that landowners must conduct all appropriate inquiries (due diligence) to determine past uses and ownerships of a property prior to acquiring the property. EPA established a Negotiated Rulemaking FACA Committee consisting of both private sector stakeholders and state program officials who were familiar with and had experience in implementing processes to conduct all appropriate inquiry. The committee reached consensus on a draft regulation and agreed to support EPA's notice of proposed rule making. This committee was subject to FACA because:

- it was formed and managed by EPA;
- it was intended to and did provide advice to EPA.

2) National Advisory Council for Environmental Policy and Technology (NACEPT)

In 1988, NACEPT was established to provide advice to the EPA Administrator on a broad range of environmental policy, technology and management issues. NACEPT helps EPA tap into the knowledge, expertise, and experience (of public, private and non-profit groups) that would otherwise be unavailable to the Agency. The impact of NACEPT's recommendations include: (1) creation of the EPA Office of Environmental Education, (2) creation of the EPA position of Chief Information Officer, and (3) establishment of the EPA Technology Innovation Office. The committee was subject to FACA because:

- it was established and managed by EPA;
- it offered group advice to EPA;
- membership included individuals who were not federal employees or elected officials of state, local, or tribal government.

3) National Environmental Justice Advisory Committee (NEJAC)

The National Environmental Justice Advisory Committee (NEJAC) was established to provide advice and recommendations to the Administrator on areas relating to environmental justice issues. The members of NEJAC, who represent a wide range of stakeholders (community-based groups; industry and business; academic and educational institutions; state and local governments, federally-recognized tribes and indigenous groups; and non-governmental and environmental groups), believe it is important for governments to consider environmental justice issues when making decisions that may affect human health and the environment. NEJAC has made numerous recommendations to EPA including development of a recommended "Model Plan for Public Participation," a tool to enhance the participation process and to promote early interaction with potentially affected communities prior to making decisions. The Plan was ultimately adopted by EPA and is currently utilized by several federal, state, and local governments. The committee is subject to FACA because:

- it was established and is managed by EPA;
- it offers group advice to EPA;
- membership includes private stakeholders as well as officials or employees of state, local, and tribal government.

How does this guide relate to EPA's Public Involvement Policy?

EPA's Public Involvement Policy urges Agency officials to "maximize the use of existing institutional resources for consultation and involvement processes" such as FACA groups.

See the Public Involvement Policy, "Appendix 4 - Advisory Committees" at <http://www.epa.gov/publicinvolvement/policy2003/appendices234.pdf>.

Collaborations NOT subject to FACA

1) Sustainable Environment for Quality of Life (SEQL)

EPA is working with stakeholders in the fast-growing area spanning Charlotte, NC, and Rock Hill, SC, to achieve a healthy environment, vibrant economy, and high quality of life. SEQL is an integrated environmental initiative for the 15-county metropolitan Charlotte region in North and South Carolina. Through technical assistance, regional vulnerability assessments and water quality monitoring, EPA has assisted leaders promote regional solutions for regional issues which is the driver for this unique and innovative partnership between the Centralina Council of Governments and the Catawba Regional Council of Governments. It promotes implementation of specific Action Items on Air Quality, Sustainable Growth and Water Resources and consideration of environmental impacts in decision-making at local and regional levels. SEQL is not subject to FACA because:

- non-Federal entities convened/assembled it;
- SEQL does not render specific advice or recommendations to the Agency;
- EPA does not manage or control it (that is, EPA does not select the membership, set the charge, or provide funding).

2) Unified National Strategy for Animal Feeding Operations

In 1998, the interagency Clean Water Action Plan (CWAP) identified polluted runoff as the most important remaining source of water pollution. Among other action items, the CWAP called for USDA and EPA to develop a Unified National Strategy to minimize the water quality and public health impacts of animal feeding operations (AFOs) by using an appropriate mix of regulatory and voluntary approaches. One year later, following a series of negotiations between USDA and EPA and an extensive public outreach effort including eleven national listening sessions throughout the U.S., the final AFO strategy was released. The USDA-EPA AFO Strategy partnership was not subject to FACA because:

- the partnership group included only Federal employees;
- the listening sessions were used to obtain individual public comment on the development of the strategy.

3) The Smart Growth Network (SGN)

EPA joined with several non-profit and government organizations to form the SGN in 1996. The Network was formed in response to increasing community concerns about the need for growth that boosts the economy, protects the environment, and enhances community vitality. Since its inception, Network partners have worked cooperatively to implement national conferences, produce publications, and launch outreach campaigns. The SGN is not subject to FACA because:

- SGN functions as a forum for developing and sharing information, innovative policies, tools and ideas;
- SGN does not provide advice to EPA;
- SGN is not subject to strict management or control by EPA.

Who can I contact to learn more?

For information, advice and assistance on:

- Conducting situation assessments and designing stakeholder consultation and collaboration processes:

Conflict Prevention and Resolution Center (CPRC)

www.epa.gov/adr, 202-564-2922,
adr@epa.gov

- Establishing or managing a Federal advisory committee or subcommittee:

Office of Cooperative Environmental Management (OCEM)

www.epa.gov/ocem, 202-233-0065

- Legal issues relating to FACA:

The Office of General Counsel (OGC)/ Cross-Cutting Issues Law Office

www.epa.gov/ogc, 202-564-7622